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EXTRAORDINARY

PART II—Section 3

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No. 132] NEW DELHI, TUESDAY, MAY 26, 1953

ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 14th May 1953

S.R.O. 966.—WHEREAS the election of Shri Sudhir Chandra Bhandari of Raipur, P.O. Maheshtala, District 24-Parganas, as a member of the Legislative Assembly of West Bengal, from the Maheshtala constituency of that Assembly, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Niharendu Dutt Mazumdar of No. 7, Mayfair Road, Ward No. 19, P. S. Karaya, P.O. Ballygunj, Calcutta 19;

AND WHEREAS the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the said Act for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, WEST BENGAL

ELECTION PETITION No. 172 OF 1952

ELECTION CASE No. 6 OF 1952 OF WEST BENGAL.

CORAM:

Shri S. C. Ray Chaudhuri, M.A., LL.B.—Chairman.

Shri M. N. Gan, M.A., LL.B.

Shri Sudhir Kumar Bhose, M.Sc., LL.B.—Members of the Tribunal.

In the matter of an application under Section 81 of the Representation of the People Act, 1951

AND

In the matter of Sri Niharendu Dutt-Mazumdar—*Petitioner.*

Versus

1. Sri Sudhir Chandra Bhandari residing at Raipur, P.O. Maheshtala, P.S. Maheshtala, Dt. 24-Parganas.
2. Sri Amla Mandal, Pleader, residing at No. 8, Kalitara Bose Lane, Beliaghata, P.S. Beliaghata, Calcutta-16.
3. Sri Tejendra Kumar Basu residing at Batanagar, P.O. Batanagar, P.S. Maheshtala, Dt. 24-Parganas.

4. Sri Sudhir Mukhōṭī (a) C/o Bata Mazdoor Union, Nungl, P.O. Batanagar, P.S. Maheshtala, Dt. 24-Parganas, and/or (b) No. 18. Mirjapur Street, Calcutta.
5. Sri Nēgendra Nath Paul, Pleader, residing at Village Par Bangla, P.O. Batanagar, Nungl Union, P.S. Maheshtala, Dt. 24-Parganas.
6. Janab Munsif Ali Molla, Pleader, residing at Meherali Mandal Street of Maminpur Road, P.S. Ekbalpur, Calcutta-27—Respondents.

FOR PETITIONER:

1. Sri K. P. Khaitan
2. Sri Ranadeb Chaudhuri
3. Sri A. K. Das
4. Sri N. Roy—*Counsel*.
5. Sri Pramotha Kumar Chakraborty.
6. Sri Amal Chandra Roy—*Advocates*.

INSTRUCTED BY.

Sri Provat Kumar Bose—*Solicitor*.

FOR RESPONDENT:

Sri S. K. Acharya
 Sri Tarun Basu—*Counsel*.
 Sri Bejoy Bhose
 Sri Arun Prokash Chatterjee
 Mr. Chiu Haitao—*Advocates*.

The 8th May, 1953.

JUDGMENT

The election to the West Bengal Legislative Assembly from Maheshtala Assembly Constituency in the Sadar Sub-division of District 24-Parganas, has been called in question under Section 81 of the Representation of the People Act, 1951.

The Petitioner and the six Respondents contested the election in the said single-seated Constituency. The election was held on 12th January, 1952 and the result of the election was declared on 25th January, 1952 after the counting of votes. The Respondent No. 1 Sudhir Chandra Bhandari who polled 6614 valid votes, was declared elected. The Petitioner Sri Niharendu Dutt Mazumdar polled the next highest number of votes, viz., 6451. The Respondent No. 2 Amiya Mandal polled 3334 votes. His nomination paper is said to have been improperly accepted as it purported to have been signed by Kumud Chandra Bandopadhyay (Banerjee) as Proposer and by Sisir Kumar Bandopadhyay (Banerjee) as Seconder, was not genuine. The alleged Proposer and Seconder swore affidavits denying their signatures and the alleged Proposer Kumud Chandra Banerjee instituted a criminal case in the court of the Sub-divisional Magistrate, Alipore, 24-Parganas, on 9th January, 1952 disclosing the fraud that was practised in respect of signatures of the said persons as Proposer and Seconder. The result of the election is said to have been materially affected by the improper acceptance of the nomination paper of the Respondent No. 2 Amiya Mandal.

The polling was to be held in 67 Polling Booths in different polling stations within the Constituency including two booths at the pooling centre known as Panchoor F. P. School. It was announced that 800 voters were to cast votes in each of those two booths of Panchoor centre. One of the booths at that centre was not opened without publishing any notice for amalgamation or abolition of any of the two booths. As a result of that many of the voters had to go away either on account of the rush of voters in one booth and/or on account of the failure to locate the place where to cast their votes, on account of the illegal closure of one booth without any notice to the voters and others concerned. In consequence, out of 1600 votes to be polled at that polling centre of Panchoor less than 50 per cent. votes were polled. During the counting of votes it was noticed that as many as 289 ballot papers were unaccounted for. The matter being reported to the Election Commission, India, information was obtained that as a matter of fact 297 ballot papers remained unaccounted for. This was significant in view of the difference of only 163 votes between those polled by the Petitioner and the Respondent No. 1.

It was further noticed at the time of counting that one of the ballot boxes of Respondent No. 1 Sudhir Chandra Bhandari was of round long old type post-box pattern which was unlike all other boxes of the different candidates. No such different type of box was noticed by the polling agents of the Petitioner at the time of polling and the attention of the Returning Officer was drawn to it by a petition at the time of counting.

Furthermore, some days before the day of counting one ballot box was noticed lying in broken condition within the jurisdiction of the Maheshtala Constituency and the local police took charge of the same. The counting was held by the Returning Officer in such a manner and under such conditions as did not preclude the possibility of any foul play or causing disappearance of some of the ballot papers and it did not also become possible to ascertain which ballot box contained how many ballot papers and as such the number of ballot papers found in the unusual type of box could not be known. The Counting Agents of the Petitioner were not given opportunity to examine the seals of the ballot boxes of the candidates other than the candidates for whom the agents were appointed.

The returned candidate Sudhir Chandra Bhandari did not file the return of election expenses according to law in as much as it did not disclose expenses actually incurred.

In view of all these alleged irregularities and non-compliance with the provisions of law the Petitioner has prayed for a declaration to the effect that the election of the returned candidate Sudhir Chandra Bhandari is void and for a further declaration that the Petitioner, who obtained the next largest number of votes has been duly elected or that the election is wholly void.

The Respondent No. 1 Sudhir Chandra Bhandari contests the case. Copies of the Election Petition were served on the other respondents as required by Section 90(1) of the Representation of the People Act, 1951. None of the other respondents appeared to contest the case.

The objections raised in defence are:—

- (1) The petition is barred by limitation.
- (2) The Nomination paper of Respondent No. 2 Amiya Mandal which was accepted was not proposed and seconded by the persons as alleged in the Election Petition.
- (3) The Nomination paper of Amiya Mandal was properly accepted and the votes polled by him did not affect the Petitioner and Respondent No. 1 in any manner.
- (4) The amalgamation of two booths at Panchoor F. P. School was made with notice and consent of the candidates including the Petitioner himself, and in any event the amalgamation was regularised by proper procedure as observed under the Law relating to Elections.
- (5) The allegation that a large number of voters failed to cast their votes at Panchoor centre is false and that nowhere in Bengal on an average 50 per cent. of the total votes were polled and in almost every election some ballot papers remained unaccounted for as some of the voters did not cast their votes after receiving ballot papers.
- (6) The Polling Agent of the Petitioner became satisfied with the result of the election after having obtained a recount, and the objection regarding one ballot box not of the proper type has no substance.
- (7) The allegation regarding submission of incorrect return of election expenses by the Respondent No. 1 is denied.

It is contended that the result of the election has not at all been affected on account of any irregularity or non-compliance with the provisions of law, as alleged in the Election Petition.

The following Issues as amended at the time of trial, arise for decision.

ISSUES

1. Is the Election Petition barred by limitation?
2. Has the result of the election been materially affected by the alleged improper acceptance of the nomination paper of the Respondent No. 2 Amiya Mandal within the meaning of Section 101 (1) (c) of the Representation of the People Act, 1951?

3. Has the result of the election been materially affected by non-compliance with the provisions of the Representation of the People Act, 1951, or of any rules or orders made under the said Act or any other Act or rules relating to election within the meaning of Section 100(2) (c) of the Representation of the People Act, 1951?

4. What relief, if any, is the Petitioner entitled to?

After the commencement of the trial the learned Counsel for the Petitioner Sri A. K. Das moved a petition for amendment of the Election Petition. That petition was rejected by an order dated 15th April, 1953 with the observation that the Tribunal would discuss the question of amendment in details in its final judgment. The amendment petition was neither verified, nor any affidavit was filed in support of the same, explaining why the prayer was made at so late a stage. After the order of rejection of the original petition, a second verified petition for amendment of the Election Petition was filed repeating similar prayers giving certain further particulars. The second application was also rejected as it did not disclose any new ground for revision of the original decision of the Tribunal.

By the amendment petition the Petitioner attempted to introduce additional grounds to challenge the election. They were, (1) that several Polling Booths were not opened at the notified hour and the polling was not continued for the full statutory period of 8 hours, and (2) that undue influence was practised on Purdah-nashin Muslim lady voters who assembled to cast their votes in a particular booth. By the second amendment petition names of a few more booths were added and it was contended that the amendment was necessary to give further and better particulars in respect of the allegations made in paragraph 20 of the Election Petition. In connection with the first point it was stated in the second amendment petition that further and better particulars were given in view of the statement already made in paragraph 11 of the Election Petition.

In paragraph 11 of the original Election Petition there are allegations, that many of the voters who were to cast votes at the two booths of the polling centre known as Panchoor F. P. School "had to go away either on account of the rush of voters in one booth and/or on account of their failure to locate the place where to cast their votes on account of the illegal closure of one booth without any notice to the voters, etc." The prayer to amend this paragraph, of the Election Petition by introducing the alleged fact that Polling Booths were not opened at the proper hour and the polling was not continued for the statutory period at several centres, can by no stretch of imagination be deemed to be such particulars as contemplated in Section 83(3) of the Representation of the People Act, 1951, which allows inclusion of further particulars in the List to be supplied with the Election Petition. Similarly paragraph 20 of the Election Petition which merely stated that "the result of the election has been materially affected for the reasons stated above and for other causes", cannot be deemed to have been further elucidated as required by the law by the introduction of a totally new case that Purdah-nashin Muslim lady-voters were incapable of recording their votes on account of corrupt practices. These are not further and better particulars which can be introduced by amendment of the List of full particulars as provided in Section 83(3) of the Representation of the People Act, 1951. Prayer for addition of such totally new grounds to make out a new case is hit by the special law of limitation applicable to Election Petitions as provided in Rule 119 of the Representation of the People (Conduct of Election and Election Petitions) Rules, 1951.

Now, the question is, whether any amendment of the Election Petition is allowable under the Law. The Representation of the People Act, 1951, nowhere provides that an Election Petition can be amended. The only provision for amendment appears in Section 83(3), which allows amendment of the list of full particulars which should accompany the Election Petition. It has been held in numerous cases that an Election Petition cannot be amended. Referring to numerous English cases it has been observed in Nanak Chand Pandit's Law of Election at page 387 that, "The court has no jurisdiction to amend a petition. The only discretion given to the court is to allow the particulars already filed to be amended." In Halsbury's Laws of England, Hailsham Edition, Volume 12, Article 792, page 403, observation has been made that, "the court will not allow an amendment of particulars at the trial when such amendment really amounts to an amendment of the petition." The learned Counsel for the Petitioner, Sri A. K. Das claims amendment of the Election Petition under Order 6, Rule 17 of the Civil Procedure Code, contending that amendment is allowable at any stage. In Jagat Narain's Law of Elections and Election Petitions in India and Burma,

at p. 412 it has been observed that, "there is no provision for the amendment of a petition. Order 6 Rule 17 of the Code of Civil Procedure has no application to an Election Petition."

The application of the Code of Civil Procedure is restricted under Section 90(2) of the Representation of the People Act, 1951, to the procedure of the trial of Election Petition. There was similar provision in Rule 37 of the Old Electoral Rules. In the Saharanpore District (N.M.R.) Case reported in 1 Jagat Narain 66 (at p. 67) the question was fully discussed and we may profitably refer to the observation made therein: "It is claimed that Rule 37 [corresponding to Section 90(2) of the Representation of the People Act, 1951] directs the Commissioners to enquire into petitions "as nearly as may be in accordance with procedure applicable under the Civil Procedure Code, 1908, to the trial of suits," and that we ought to amend this petition and supply the missing particulars now. The Petitioner's Counsel professes to rely on Order 6, Rule 17, Civil Procedure Code. We hold, however, that Rule 37 only makes the Civil Procedure Code applicable to the conduct of the enquiry and not the Petition. In the case of an ordinary civil suit the trial Court is empowered to accept, reject, or at any time amend the plaint. This is not so with an Election Petition, which under Rule 30 [corresponding to Rule 119 of the Representation of the People (Conduct of Election and Election Petitions) Rules, 1951] can be accepted within a limited period of 14 days from the date of publication of the result of the election. Further, there is no provision anywhere in the Act or the Rules for the amendment of a petition. Indeed any amendment appears contrary to the whole tenor and spirit of the Rules. The short time limit permitted and the insistence in Rule 30 on furnishing at once of the full particulars, are evidently intended to ensure that the returned candidate shall without any delay be informed of the exact nature of the charges which he will have to meet. To allow amendments and additions would be to defeat this very salutary provision". We fully accept this view of the learned Commissioners, which has been endorsed in American Jurisprudence, Volume 18, Elections, Section 300, page 373, observing that, "where the proceeding in an election contest is governed by a special statute which does not provide for amendments and in which the proceedings are not assimilated to some practice so providing, amendments of the contestant's pleadings cannot be permitted to set up a ground of contest not stated in the original pleadings."

The learned Counsel for the Petitioner has referred to A.I.R. 1930 Calcutta, 534 and to 3 O'M & H, 94. (Borough of Evesham Case.) In Evesham case additional particulars regarding bribery which was already pleaded, was accepted for the purpose of reporting about corruption that prevailed in the election, irrespective of the petition and the question of unseating the sitting member. That case does not at all support the Petitioner's contention. The case reported in A.I.R. 1930 Cal. 534 deals with amendment of the plaint of a civil suit. Even in that case it was observed that amendment is refused, almost invariably, where the purpose of the amendment is to add a plea of fraud, where fraud has not been pleaded in the first instance.

We record these reasons for rejecting the prayer of amendment of the Election Petition.

We now proceed to decide the Issues.

Issue No. 1.—In the Election Petition the addresses of the Respondents were not given. The Election Petition was received by the Secretary, Election Commission, India, on 21-4-1952. It was presented within the time as required under Rule 119 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, as the Gazette Notification regarding the lodging of the return of election expenses was published in the Calcutta Gazette Extraordinary, Part 1 page 721, dated April 10, 1952. Section 90(1) of the Representation of the People Act, 1951, enjoins that the Tribunal shall, as soon as may be, cause a copy of the Election Petition be served on each respondent. There being no address of any of the Respondents in the Election Petition, the Tribunal by Orders dated 5-8-52 and 18-8-52 directed the Petitioner to supply the addresses of the Respondents. By a verified petition dated 27-8-52 the addresses were supplied and the said petition was made part of the Election Petition. The learned Counsel for the Respondent No. 1, Sri S. K. Acharya contends that the Election Petition became time-barred when it was completed on 27-8-52, supplying the necessary addresses. He invokes the application of Order 7 Rule 1(c) of the Civil Procedure Code which requires that "The plaint shall contain the name, description and place of residence of the defendant, so far as can be ascertained". Relying on A.I.R. 1931, Calcutta, 458(561), it is argued that explanation should have been given in the plaint for not supplying the addresses, in order to save limitation. The Tribunal has already expressed its view in connection with the question of amendment of the Election Petition, upholding the contention

of the learned Counsel that the application of the Civil Procedure Code to election petition is restricted by Section 90(2) of the Representation of the People Act, 1951, to the procedure applicable to the trial of suits, only. Section 82 of the Representation of the People Act, 1951, requires that all the duly nominated candidates at the election other than the Petitioner himself, if he was so nominated, should be joined as Respondents. The duly nominated candidates are known persons and their identity need not be established giving further descriptions. The Tribunal required the addresses of the respondents for service of the copy of the Election Petition on each of them and the supply of addresses cannot be deemed to amount to any amendment of the Election Petition. In the Representation of the People Act, 1951, there is no corresponding provision as in Order 7 Rule 1(c) of the Civil Procedure Code, for obvious reasons. It may be noted as pointed out by the learned Counsel for the Petitioner that Section 4 of the Civil Procedure Code excludes the application of the Rules of the said code, there being special form of procedure prescribed by the Representation of the People Act, 1951. No question of limitation accordingly arises. This Issue is answered in the negative.

Issue No. 2.—This is rather a misconceived objection raised without ascertaining the actual facts. The Respondent No. 2 Amiya Mandal was one of the contestants and he polled quite a large number of votes, viz. 3334. The evidence discloses that the presented two nominated papers, Ext. 5 and 5(a) at the same time on 19-11-51 and they were numbered 430 and 429, respectively. The nomination paper No. 429 [Ext. 5(a)] was first scrutinised and accepted by the Returning Officer as valid. The other nomination paper No. 430 (Ext. 5) was not even scrutinised. In this latter nomination paper the names of Kumud Chandra Bandopadhyaya as Proposer and Sisir Kumar Bandopadhyaya as Seconder, appear. Paragraphs 3 to 7 of the Election Petition deal with this nomination paper, attempting to make out a case that the signatures of the said Proposer and Seconder were forged therein and as such it was improperly accepted, thereby affecting the result of the election materially. The Respondent No. 1 averred in his written statement in unequivocal terms that Amiya Mandal was validly nominated by another nomination paper in which the Proposer and the Seconder were not the alleged persons. The Petitioner still pursues the objection examining Kumud Chandra Banerjee (P.W. 2) and Sisir Kumar Banerjee (P.W. 4) and producing the papers of a criminal case brought by the said Kumud Chandra Banerjee alleging that his signature and that of Sisir Kumar Banerjee were forged in that nomination paper. The complainant (P.W. 2) did not care even to keep any information about the result of his criminal case. That fact is not material for the purpose of this case. The Returning Officer Sri S. K. Ghosh (Court Witness No. 1) proves that he took up nomination papers serially for scrutiny and when one nomination paper [Ext. 5(a)] was found valid he did not scrutinise the other nomination paper (Ext. 5), it being the custom not to scrutinise the other nomination papers when one is found valid. He did not consider his duty to scrutinise both the nomination papers. It can be observed that the procedure followed by him is contrary to the provisions of the law. Section 33(7) of the Representation of the People Act, 1951, enables a candidate to present more than one nomination paper for election in the same constituency. Section 36(6) of the Representation of the People Act, 1951, enjoins that "The Returning Officer shall endorse on each nomination paper his decision for accepting or rejecting the same". It has, of course, been rightly contended by Sri A. K. Das, Counsel for the Petitioner that the Returning Officer was bound to scrutinise each nomination paper. This provision of law directing scrutiny of each nomination paper has much significance and the Returning Officer has no discretion in the matter. If only one of the several nomination papers of a candidate, which is first scrutinised, be found valid and accepted, and the other nomination papers are not scrutinised, the question of serious transgression of the provisions of law may arise affecting the result of the election materially, in case the accepted nomination paper be found to have been improperly accepted by the Returning Officer in a subsequent election proceeding. It should be impressed upon the Returning Officers that Section 36(6) of the Representation of the People Act, 1951, should be strictly followed and each nomination paper should be scrutinised. In this connection it may be further observed that the endorsement of acceptance should also be clearly noted on the nomination paper, instead of merely signing under the Certificate of Scrutiny. In the printed portion of the Form of Nomination Paper the grounds for acceptance are only stated. The endorsement of actual acceptance or rejection should be written, recording reasons briefly in case of rejection. The objection in respect of improper acceptance of the nomination paper of Amiya Mandal is, however, untenable in view of the fact that a different nomination paper from the one mentioned in the Election Petition was found valid and accepted.

The learned Counsel for the Petitioner, Sri A. K. Das attempts to spin out a new case that the very fact that the names of Kumud Chandra Banerjee and Sisir Kumar Banerjee who were Congress workers, were fraudulently mentioned as Proposer and Seconder in one nomination paper of Amiya Mandal, had some reaction on the electorate which materially affected the result of the election. He contends that such a case is covered by the allegation made in paragraph 20 of the Election Petition which runs thus; "That the result of the election has been materially affected for the reasons stated above and for other causes". The use of the expression "for other causes" at the end of the said paragraph can in no circumstance justify the introduction of a new case not specifically made in the Election Petition, as contended. The law does not allow to leave everything blank and to attempt at the time of trial to fish out some possible materials from which the blanks may be filled up. It has been held that this amounts to an abuse of procedure (*vide* The Lahore Case reported in Khanna's Indian Election Cases, Volume 1 page 117). Such a contention not only does not stand to reason, but is contrary to the common sense view of the rules requiring averment of material facts in the pleadings. However, there has not also been any decision that there was fraudulent insertion of the names of Kumud Banerjee and Sisir Banerjee in the un-scrutinised nomination paper of Amiya Mandal by forgeries. Kumud Banerjee (P.W. 2) and Sisir Banerjee (P.W. 4) of course, deny their signatures in the nomination paper in question, before this Tribunal. That matter cannot be investigated in this election case. P.W. 25 Lakshmi Narain Ghosh and P.W. 26 Jaharlal Ghosh are examined to give evidence that when it became widely known that Congress workers Kumud Banerjee and Sisir Banerjee were supporting the candidature of Amiya Mandal becoming Proposer and Seconder in his nomination paper, the Congress cause became weak and a large number of supporters of the Congress changed their views and intended to vote for Amiya Mandal. The evidence is cleverly introduced to argue that the result of the election has been materially affected on account of such false propaganda. The learned Counsel has laboured too much to show in a far-fetched manner that the result of the election has been materially affected on this account. Such a case is not covered by the issue framed, nor it comes under any head of corrupt practice as defined in Sections 123 and 124 of the Representation of the People Act, 1951.

The Tribunal accordingly decides this Issue against the Petitioner.

Issue No. 3.—This Issue is very comprehensive. The learned Counsel for the Petitioner, Sri A. K. Das argues that all the following points pressed by him are covered by this Issue. His contentions are:—

(a) The nomination paper of the Respondent No. 2 Amiya Mandal purported to have been signed by Kumud Chandra Banerjee and Sisir Kumar Banerjee as Proposer and Seconder, has materially affected the result of the election and there was non-compliance with the mandatory provision of law, the said nomination paper being not scrutinised by the Returning Officer.

(b) Amalgamation of two booths or closure of one booth at Panchoor F. P. School, Polling Centre No. 23 was vital transgression of the law relating to the conduct of elections whereby the result of the election has been very materially affected.

(c) There being 297 unaccounted for ballot papers and the difference of votes between the Petitioner and the Returned candidate being 163, the result of the election has been materially affected.

(d) A different type of ballot box of old post-box pattern was found in the lot of the ballot boxes assigned to Sudhir Chandra Bhandari for the first time during the counting of the votes and the ballot papers contained in that box being taken into account, the result of the election has been materially affected.

(e) One ballot box was found lying in a broken condition within the jurisdiction of the Maheshwala Constituency, which fact is suggestive of some sort of malpractice which affected the result of the election. And

(f) There was non-compliance with the provisions of law relating to the counting of votes and the irregularities complained of did not preclude the possibility of a foul play and disappearance of ballot papers affecting the result of the election.

The second point is most important. It has been lucidly argued by the learned Senior Counsel for the Petitioner, Sri K. P. Khaitan. The question will be taken up after disposing of the other points.

(a) We have already discussed the new case ingeniously set up, leading some evidence to establish how the result of the election was apprehended to be affected by the nomination paper of Amiya Mandal, which was not scrutinised, in connection with the Issue No. 2. There is no substance in this contention as already decided. Of course, there was non-compliance with the provision under Section 36(6) of the Representation of the People Act, 1951, as each nomination paper was not scrutinised by the Returning Officer. That has not affected the result of the election in this case, as Amiya Mandal was validly nominated by another nomination paper which was accepted. This point need not be further discussed.

(c) The difference of votes between the Petitioner and the successful candidate was 163. As can be gathered from the letter, Ext. 12, addressed by the Secretary, Election Commission, to the Counting Agent for the Petitioner, P.W. 25 Provash Chandra Paul, that 297 ballot papers remained unaccounted for, i.e. so many ballot papers issued from the different booths within the entire constituency, could not be found in the ballot boxes. There were as many as 40 Polling Centres with 66 Polling Booths. The total number of ballot papers issued was more than 26,000 as found on calculation from Ext. Q wherein an account how the ballot papers had been dealt with, has been given in abstract form. There are, of course, certain palpable mistakes in this document. The Secretary, Election Commission, explained in Ext. 12 the reason why a few ballot papers may remain unaccounted for in each booth, either for not depositing the ballot paper in the ballot box by certain ignorant or mischievous voters or due to mistake in calculation by the Presiding Officers. These reasons which formed part of the argument of the learned defence Counsel Sri S. K. Acharya are quite logical. The unaccounted for ballot papers were a little over one per cent. of the total number of ballot papers issued. By no stretch of imagination it can be suggested that those unaccounted for ballot papers, even if found, could advance the case of the Petitioner in any manner, or even of any other candidate. The result of the election has not been affected at all for the loss of the unaccounted for ballot papers. This objection is groundless.

(d) One long cylindrical old type ballot box was found at the time of counting of the votes. A futile attempt is made to prove that no such type of ballot box was used at the time of polling, examining certain witnesses (P.Ws. 16, 17, 20 and 21), to say that they only noticed square type of ballot boxes in the booths where they cast their votes. It appears from the Register of ballot boxes, Ext. 10, that at Polling station No. 9 one old type box was used—vide Ext. 10(b). From the evidence of the Returning Officer Sri S. K. Ghose, examined as Court witness No. 1, it is obtained that at each polling booth reserve ballot boxes mostly of long old type, were supplied for use in case of emergency when the ordinary Bungo type of box was found defective in mechanism. The Presiding Officer of Polling Station No. 9 did not give any reason in his report why he used one old type box, against Items Nos. 11 and 12 of his Report [in Ext. 11(a) Series]. He made a note "The same as given for H.P." Those items refer to "any point of special interest in connection with the election" and "Remarks." The report of the House of the People election is not before us, so it cannot be ascertained what was his observation against these items in the same. The comment made by the learned Counsel for the Petitioner on account of absence of any remark for using the old type ballot box has very little significance. The evidence of the Returning Officer has been very much adversely criticised by the learned Counsel for not being able to say from his memory in what booth the old type of ballot box was used. When the Returning Officer noticed Ext. 10(b) he repeated what was recorded therein. Adverse comment has also been made as there is no note about the return of the reserve ballot boxes, in the Register Ext. 10. It is clear from the evidence of the Assistant Returning Officer, P.W. 27, Sri F. M. Sanyal that the Officers had to remain busy almost whole night after the strenuous work of election during the day. It was more important to keep notes in the Register how many ballot boxes were actually used or, in other words, how many ballot boxes containing ballot papers were returned and that was properly done. The absence of any note regarding reserve ballot boxes is quite immaterial. P.W. 23 Provash Chandra Paul, the Counting Agent of the Petitioner submitted a petition, Ext. 7, on 25th January 1952 stating therein that one old type box was found in the lot of Sudhir Chandra Bhandari. He also says so in his evidence before this Tribunal and he is corroborated on this point by P.W. 18 Nagendra Nath Paul who was the Counting Agent of the Respondent No. 5 Nagendra Nath Paul. The Returning Officer in his report dated 28th January 1952 to the Chief Electoral Officer, dealing with the objections of Provash Chandra Paul, stated in paragraph 6 (vide Ext. F) that the old type of ballot box was used for the candidate Tejendra Kumar Basu who secured only 830 votes. He further observed that, "even if an old type box had been issued for the successful candidate

Sri Sudhir Chandra Bhandari there would not have been any irregularity, but in point of fact it was not done". There is no suggestion even that one ordinary type of square box was replaced by the old type cylindrical box, exercising any corrupt practice. After the counting of the votes there was some agitation in the party of the Petitioner. The Petitioner with some of his agents, who have been examined, approached the D.I.G. Mr. H. L. Saha (P.W. 3) who inspected the ballot boxes and directed the guards to see that the old type box be not removed. It seems that there was attempts over a tea pot suspecting some foul play of which no specific suggestion even could be made in the Election Petition. Much unnecessary and unjustifiable comment has been made by the learned Counsel Sri A. K. Das in course of the discussion of the evidence of the Returning Officer Sri S. K. Ghose on this point. There was nothing unnatural or unusual and there was no violation of any rule for using one long old type box in a Polling Station. A futile attempt is made to introduce through P.W. 23 Provash Chandra Paul that the said old box contained larger number of ballot papers than the other boxes. The disjointed facts stated in the Election Petition, namely, the use of one long old type box, the finding of another square type box lying within the jurisdiction of the constituency and that 297 ballot papers remained unaccounted for, are being tacked together to suggest a case of some foul play. These unconnected and disjointed facts do not establish any foul play in view or the evidence. No such definite case has also been made. The ballot papers found in the old type of ballot box were counted and there was absolutely no ground for rejecting them. According to the official report those votes were cast in favour of the candidate Tejendra Kumar Basu who secured very small number of votes. The result of the election has not been affected in any manner by the counting of ballot papers found in the old type box.

(e) The finding of one empty ballot box near Santoshpur within Maheshatala Constituency has been stated to be a ground for materially affecting the result of the election. How this isolated fact has affected the result of the election of Maheshatala Constituency has not been stated. In his petition, Ext. 7, Provash Chandra Paul (P.W. 23) mentioned that a ballot box was found by a villager lying by the roadside somewhere near Santoshpur within Maheshatala Constituency. The said ballot box was taken in police custody. The enquiry reports Exts. N & O, and the Returning Officer's report, Ext. F paragraph 8, make it clear that the said box was a Godrej type ballot box of Olive green colour issued for the Parliamentary election in the Budge-Budge segment of Diamond Harbour Constituency and probably it dropped from a vehicle in transit on or about the 13th January. For the Maheshatala Assembly Constituency Bungo type of ballot boxes of chocolate colour were assigned. The discovery of the green Godrej type box at Santoshpur on the road side could not have anything to do with the election of Maheshatala constituency. The unnecessary oral evidence adduced on this point deserve no comment. The result of the election in question has not in any manner been affected by the fact of finding an empty ballot box of a different type and of a different colour, somewhere within the Constituency.

(f) Complaints have been made that the counting of the votes was not held following strictly the provisions of the law. The main grievances, as stated by P.W. 23 Provash Chandra Paul, are that the counting agents had to remain within an enclosure at some distance and they could not notice what took place at the counting tables and that the agents of the candidates other than those of the candidate whose ballot boxes were opened, were not permitted to examine the seals of all the ballot boxes. He admits that the ballot boxes were opened just by the side of the enclosure of the counting agents and empty boxes were shown after pouring out the contents on the counting tables. He had some suspicion at the close of the counting that there was mistake in the counting of ballot papers, so he applied for recount and his prayer was allowed. Rule 46 of the Representation of the People (Conduct of Elections and Election Petitions) Rule, 1951, lays down the procedure to be followed at the counting of votes and states what part the counting agents can play during the time of such counting. Sub-rule (iii) of the said Rule provides that "The Returning Officer shall then allow the candidates and their election agents and counting agents present at the counting an opportunity to inspect the ballot boxes and their seals for satisfying themselves that they are in order". The Returning Officer stated that the rules were strictly followed. Of course, all the candidates were not allowed to huddle together at the place where the boxes of each candidate were brought at the time of opening them, but from the evidence of P.W. 23 Provash Chandra Paul it is clear that the ballot boxes were opened just by the side of the enclosure of the counting agents. The counting agents had evidently opportunity to oversee the ballot boxes of each candidate and the seals thereon. The learned Counsel for the Petitioner has made a grievance that special facility had been given to the counting agent of the particular candidate whose ballot boxes were opened, to examine

more closely. This additional privilege given to the particular counting agents of the candidates whose boxes were opened, did not amount to any violation of the Rule. From the evidence of the counting agent of the Petitioner himself it is evident that sufficient opportunity was given to the counting agents present to inspect the ballot boxes and their seals for satisfying themselves that they were in order. No objection on this score appears to have been raised at that time. The only other privilege given to the counting agents has been mentioned in Sub-rule (vii) of the said Rule 46. The candidates, their election agents and counting agents who may be present should be allowed reasonable opportunity to inspect all ballot papers which in the opinion of the Returning Officer are liable to be rejected but they should not be allowed to handle those or any other ballot papers. Practically they were to oversee the ballot papers which were being rejected. The Returning Officer was sitting at a distance of 10 or 12 feet from the enclosure of the counting agents. There was no objection to rejection of any ballot paper. There is no case that any counting agent was denied the privilege given to him under the said Sub-rule (vii).

It has been further contended that no separate account of ballot papers found in each ballot box of every candidate was kept. Sub-rule (v) of Rule 46 requires that the Returning Officer "shall take up the counting of ballot papers contained in the ballot boxes. The counting of all the ballot papers contained in the ballot boxes allotted to the same candidate shall be completed before the counting of the ballot papers contained in the boxes allotted to any other candidates is commenced". The Sub-rule (vi) provides that "thereafter the ballot papers shall be taken out from the box and arranged in convenient bundles and counted with the aid of persons appointed to assist in the counting of votes. An account of the ballot papers found in each box allotted to each candidate shall be recorded in a statement in Form 14." Ext. D is account of ballot papers maintained boothwise for each candidate in Form 14. The Rule appears to have been strictly followed. There is no force in the contention that no account was kept of the ballot papers found in the different ballot boxes of the different candidates.

After the counting of votes application was made under Rule 48 for recount by Provash Chandra Paul and his prayer was granted *vide* Ext. 6 and the order passed thereon. It is in evidence that on recount one vote of the Petitioner increased. It was endorsed on the back of Ext. 6 by Provash Chandra Paul and Sudhir Chandra Bhandari that recount was made in their presence—*vide* Ext. 6(a). Clearly the procedure to be followed under Rule 48 at the counting of votes was substantially observed. It is not a fact that the counting took place in a manner and under conditions which did not preclude the possibility of any foul play causing disappearance of some ballot papers affecting thereby the result of the election. This objection is groundless.

(b) We will now discuss the second contention which is of vital importance. It arises on account of amalgamation of two booths or closure of one booth at Polling Station No. 23 Panchoor F. P. School. The whole law relating to the manner prescribed in the Representation of the People Act, 1951, and the Rules and Orders made thereunder, for the conduct of election, with reference to the statutory right given to every elector and the authority vested in the Election Commission by the Constitution, has been fully placed before the Tribunal by the learned Counsel Sri K. P. Khaitan for the Petitioner.

The learned Defence Counsel Sri S. K. Acharya has rightly contended that the whole question depends upon two material facts, *viz.*, (a) whether the amalgamation of two booths at the same Polling Station was contrary to law and the irregularity on account of such amalgamation was validly regularised by the Election Commission; and (2) Whether the result of the election has been materially affected on account of such amalgamation.

The fact is admitted that the Returning Officer exercising his power under Rule 18(2) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, fixed two booths at Panchoor F.P. School Polling Station No. 23 and set them apart for the recording of votes of electors specifically allotted to each booth. As required under Section 25 of the Representation of the People Act, 1951, previous approval of the Election Commission was obtained and a list showing the Polling Stations with the Polling Booths, the polling areas for which they have been provided and the specific numbers of the electors allotted to each booth, was published—*vide* Ext. 3. The Returning Officer Sri S. K. Ghose (C.W. 1) gives evidence that he made arrangements for two Assembly booths and two Parliamentary booths at Panchoor F.P. School accepting the report of the Circle Officer. He did not personally inspect the Polling Centre. The Presiding Officer of the Polling Station No. 23 was one Sri B. B. Dutta, an Officer of the B. N. Railway.

as we get from the evidence of the Assistant Returning Officer, Sri F. M. Sanyal (P.W. 27) and the Register of Presiding Officers and Polling Officers, Ext. R. The Register further shows that 8 Polling Officers were appointed for the station. The Presiding Officer Sri B. B. Dutta was summoned by Respondent No. 1 as witness, but his evidence has not become available as he has not been brought during the trial for examination. The Returning Officer and the Assistant Returning Officer came to know about the fact that only one booth was opened at Panchoor F. P. School, after the polling was over when the Presiding Officer returned one set of empty ballot boxes both for the Assembly Constituency and the Parliamentary Constituency along with the other set of used ballot boxes.

We cannot but too strongly condemn such act of the Presiding Officer who signally failed to perform his duties according to law and exhibited lamentable lack of his sense of responsibility. It is very unfortunate that he could not realise that the discharge of his duties in an arbitrary manner without any previous sanction, could avoid the whole election throwing away for nothing the heavy expenditure incurred by the State and putting the candidates to unnecessary huge expenses and harassment. Electors of the whole constituency also suffer on account of such irresponsible act of the officer-in-charge of the election, if the election is declared void.

The Returning Officer reported about the serious irregularities by his letter (Court Ext. 1) dated 18th January 1952 to the Chief Electoral Officer, West Bengal. The matter was brought to the notice of the Election Commission by letter No. 468-A.R., dated 19th January 1952. On 22nd January 1952 i.e., before the counting of votes the Election Commission by telegram (vide Ext. A) approved of the use of one Assembly booth instead of two allotted in Polling Station No. 23 of Maheshtala Assembly Constituency. The jurisdiction of the Election Commission to cure any such irregularity by approval given *ex-post facto* is seriously questioned by the learned Counsel and the result of such approval is discussed. In December 1951, evidently before the election, the Chief Electoral Officer, West Bengal made a reference to the Election Commission regarding provision of polling booths in certain constituencies in Ghatal and Contai Sub-divisions. The Election Commission then issued instructions, dated the 23rd December, 1951 to the effect that, "in all other cases where conversion of a double-boothed polling station (already approved by the Commission) into two single-boothed polling stations at the same place was necessary, the Commission's approval should be presumed but the changed particulars should be sent to the Commission for information and record."—Vide Ext. S. Sri S. K. Acharya, learned Counsel for Respondent No. 1 contends referring to these two documents, Exts. A and S, that the infringement of the provisions of the law by the Presiding Officer, if any, was validly regularised by the Election Commission. Mr. Khaitan, on the other hand, contends that this omnibus previous order contained in Ext. S had no relevancy as the Returning Officer did not make any change in the arrangement of the booths at Panchoor F. P. School in view of such direction of the Election Commission, hence no question of presuming Commission's approval did arise and as such Ext. S cannot support the defence contention. The Returning Officer instead of approving the action of the Presiding Officer complained that the latter committed serious irregularity.

Let us now examine the position of the law and the fact regarding use of one booth instead of two. Arguments have been advanced by the learned Counsel Mr. Khaitan on this subject, discussing the question threadbare.

Under Article 170(1) of the Constitution, the Legislative Assembly of each State shall be composed of members chosen by direct election. Article 326 provides for adult franchise. Under Article 327 the Parliament has been given powers to pass election laws. Article 324(1) vests in the Election Commission "the superintendence, direction and control of the preparation of the Electoral Rolls for, and the conduct of all elections to Parliament and to the Legislative of every State". Electoral Roll has been prepared according to the provisions in the Representation of the People (Preparation of Electoral Rolls) Rules, 1950. Section 25 of the Representation of the People Act, 1951 provides that "It shall be the general duty of the Returning Officer at any election to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by this Act and rules or orders made thereunder". It has been rightly contended that the Returning Officer has no power to act departing from the manner provided by the law. Under Section 25 with the previous approval of the Election Commission he is to provide a sufficient number of Polling Station for each constituency and to publish a list showing the polling stations so provided and the polling areas for which they have respectively been provided, in

such a manner as the Election Commission may direct. In the present case such a list Ext. 3 was published by him. The duty of the Presiding Officer under Section 27 is to keep order at the Polling Station and to see that the poll is fairly taken. The learned defence Counsel, Sri S. K. Acharya attempts to defend the action of the Presiding Officer referring to this Section. In order to see that the poll is fairly taken the Presiding Officer is to guard against any malpractice. But he has not been given any power to make any change of arrangement of recording votes of the electors. Rule 18(2) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, gives the Returning Officer the right to fix at each polling station one or such larger number of polling booths as he may consider necessary but each such polling booth shall be set apart for the recording of votes of electors specifically allotted to such booth. It was notified that at Panchoor F. P. School Polling Station No. 23 electors Nos. 1 to 800 should cast their votes at Booth No. 1 and electors Nos. 801 to 1,600 at Booth No. 2—vide Ext. 3. Separate ballot boxes for each booth were given to the Presiding Officer. It is contended by Mr. Khaitan that the electors allotted to one booth could not be asked to cast their votes in a different booth and the ballot boxes which were not used at all on account of closure of one booth are to be considered as ballot boxes unlawfully taken out within the meaning of Section 58 of the Representation of the People Act, 1951, and thus occasion arose for holding fresh poll. We cannot, however, agree with this view of the learned Counsel going so far as to hold that there was a case of fresh poll for not using the ballot boxes intended for one booth. Section 59 of the Representation of the People Act, 1951, provides for the manner of voting at election. It is imperative that the votes shall be given by ballot in such a manner as may be prescribed. "Prescribed" means prescribed by the rules made under the Act—vide Section 2(g). Under Section 62 of the Representation of the People Act, 1951, every elector is entitled to vote for the constituency in the electoral Roll of which his name has been entered. It is argued that 800 voters of one booth were according to law deprived of their right of franchise and the ballot papers left by some of them in a different booth should be cancelled as such ballot papers are not allotted to that booth. This nice argument has some force as the arrangement of booths was not changed at all and the Presiding Officer had no right under the law to make any new arrangement according to his pleasure. Under Rule 12 Polling Officers were appointed for each booth. Rule 17 lays down who can be admitted in each booth. It is contended that the officers and the electors who were allotted to one booth could not be admitted in the other booth. Discussing Rule 19 it is observed that the Returning Officer provided the necessary requirements under Sub-rule (i), but the Presiding Officer acted without jurisdiction by not using separate booths and the separate ballot boxes so provided. Referring to the evidence the learned Counsel invites attention to the material fact that the provisions of Sub-rule (iii) of Rule 19 were not followed, as notices were not displayed outside the polling station and inside the polling booth as required and contends that this infringement was vital. The notices should be displayed to guide the electors. It is further contended that when there were arrangements for two separate booths, the procedure laid down in Rule 25 as to the manner of recording of votes was not followed, as the voters of one booth were not entitled to proceed to the polling compartment of another booth. Under rule 33 Presiding Officer was to submit ballot paper account for each polling booth separately in Form No. 10. This Rule was also violated as only one booth was used and some of the voters of each of the two booths were allowed to drop their ballot papers in the ballot box of one booth. The account of ballot papers in Form No. 14 was not prepared for each booth as required under Rule 46 Sub-rule (viii). The learned Counsel questions under Rule 47(4) the validity of the ballot papers accepted by the Returning Officer, contending that the decision of the Returning Officer is not final and the Election Commission cannot cure such vital irregularity by an *ex post facto* order, as the ballot papers intended for one booth cannot be deemed to be valid for another booth.

Referring to all these transgression it is submitted with good reasons that the *ex post facto* approval of the Election Commission has not cured the vital infringements and as such there has been no election according to law at Panchoor F.P. School centre. It is further argued that irrespective of the fact whether the result of the election has been materially affected or not, the election has become *ipso facto* void on account of not holding the same in the manner prescribed by the law. It is abundantly clear that an indiscreet action of the Presiding Officer upset the whole procedure of election which should be complied, if not meticulously at least substantially. Mr. Khaitan observes that the provisions of the Rules are by their very nature mandatory, but whether they be mandatory or directory, there being no compliance, the whole election must be deemed to be void. "Statutes are to be construed as mandatory and imperative when they prescribe acts to be done by private parties" (Craies on Statute Law, 5th Edition, page 60). The Returning

Officer made no change and no fresh notification was issued, the voters were bound to act according to the programme previously notified.

Considering the cumulative effect of the transgressions, the Tribunal holds that there was no election according to law at Panchoor F. P. School Centre No. 23.

On the second question whether the result of the election has been materially affected or not, it has been argued that the very fact that the election was not held in the manner prescribed and thereby at least one set of 800 voters being not given proper and legal facilities to cast their votes, the result of the election must be deemed to have been materially affected. In the Constituency there are 1800 voters as the Electoral Roll Ext. 4 as well as the notification Ext. 3 show. The evidence of the Returning Officer is, that ordinarily 600 to 700 voters are allotted to each booth to cast votes within the statutory period of 8 hours, but some discretion remains with the Returning Officer to fix the number according to the conditions of the centre and other local circumstances. He decided that there should be two booths at Panchoor F. P. School Centre No. 23 and 800 voters should be allotted to each booth. The arrangement must have been made in the School for two Assembly booths and also two Parliamentary booths. Photographs of the front view of the School room have been produced by the parties. There is a pretty big hall as the photographs and the evidence disclose. There was some difficulty there being only one door for entrance and exit. The Respondent's witness No. 3 Majibar Rahman, the Polling Agent of the Respondent No. 1 Sudhir Chandra Bhandari, has been examined to say that as there was one door, the Presiding Officer in consultation with the Petitioner Sri Niharendu Dutt-Mazumdar and the other candidates and agents present, decided to work with one booth instead of two for the sake of convenience. Of course, Sri Niharendu Dutt-Mazumdar has not examined himself to deny the fact, but his case, as stated, in paragraph 9 of the Election Petition is, that for the first time on the date of counting, it was discovered when instead of 67 ballot boxes for each candidate 66 were found, that there was amalgamation of two booths. It is indeed difficult to accept that he had no knowledge of the amalgamation of the booths previously as his agents who worked in the booth and supervised the polling, had occasion to know that two booths were combined. However, no knowledge or consent of the candidates or of their agents can cure the irregularity, nor create any estoppel against the statutory requirements. Reference in this connection may be made to the judgment of Sri Ashutosh Mookerjee J reported in 24 C.W.N. 189(193). The Electoral Roll shows that there were as many as 618 female voters i.e. about 38.6 per cent. The evidence establishes beyond doubt that the female voters were mostly 'purdah nashin' Muslims. Rule 18(2), Proviso (b) gives the Returning Officer the authority to direct that men and women shall, for the purpose of recording their votes, be admitted into the polling station or into any polling booth of any such station alternately in separate batches. No separate booth for women electors was arranged nor any direction was given to give proper facility to women electors to cast their votes in the manner stated in Proviso (b). It appears that only 60 female voters could cast their votes. Evidence has been adduced that many voters had to go away without voting owing to inadequate polling arrangements. Evidently, many of the female voters were deprived of their right of franchise. This has been held to be a good ground for declaring an election void in Magwe West Case reported in Hammond's Election Cases, p. 505(310).

There has been infringement of the provisions of the law on account of closure of one booth by the Presiding Officer without any authority whatsoever and against the definite notification directing two sets of voters to cast their votes in different booths. It was the essential duty of the Presiding Officer to maintain order and to see that the poll was taken fairly under the notified arrangement regarding booths. The school house has one door, accordingly one booth was closed for the sake of convenience, as contended in defence referring to the evidence of R.W. 3 Majibar Rahman. The law does not authorise the Presiding Officer to make any such vital change affecting the electors, even with the consent of the candidates and their agents. There should have been different passages for entrance and exit. The photograph of the door (*vide* Ext. 2) shows that it is sufficiently wide and different passages for entrance and exit could be improvised by dividing the space in equal halves fixing a barrier with rope or split bamboo and arrangement might be made to guide the electors to their respective booths. By using one booth instead of two, 670 ballot papers could be issued working for the statutory period of 8 hours as noted in Presiding Officer's Report, Ext. 11(b). On the average about 84 voters could be attended per hour. It was hardly possible to admit more voters per hour in one booth. There were 1800 voters allotted to the station. Making some allowance for absentees, it was physically impossible to allow so many voters to cast their votes in one booth, accordingly the Returning Officer made arrangement for two booths. By upsetting the arrangement the Presiding

Officer deprived a large number of voters their right of franchise. If two booths had been worked by the two sets of Polling Officers provided, many more voters could be admitted within the statutory period, if not double the number. Through the same passage for entrance the voters could be allowed to go to their respective booths, admitting one for each at a time and after casting their votes they could go out by the exit passage. The instructions issued to the Presiding Officers for administrative convenience and methodical way of conducting the election, contained in the printed book, Ext. 13, if followed, many of the difficulties could be solved and overcrowding, noise, confusion and mismanagement could be avoided. Separate enclosures should have been arranged for the voters of the different booths, both for males and females, and the men and women voters might be admitted by turn as laid down in Proviso (b) of Sub-rule (2) of Rule 18.

Evidence has been adduced on the side of the Petitioner that there were overcrowding, confusion and row at the Polling Station and many voters went away without casting their votes on account of the closure of one booth and mismanagement.

P.W. 5 Haj Golam Kibria was the first man to cast his vote after 9 A.M. There was great crowd at that time and people were shouting. The witness being a 'Haji Sahib' was first allowed by the people to go into the booth to cast his vote.

P.W. 6 Alef Nabi Kaji could not cast his vote after waiting for an hour. He left the Polling Station with 40 or 50 other persons and could not go again on account of his business. He, of course, cannot say if the other persons went again to cast their votes.

P.W. 7 Sheikh Jainal Abedin, another voter, could not cast his vote waiting for $\frac{1}{2}$ to $\frac{3}{4}$ th of an hour from 2 or 2-30 P.M. on account of great crowd. He noticed some 25 other men to leave the booth without being able to cast their votes.

P.W. 8 Kouser Ali Seikh says that there was great crowd till 5 P.M. when the booth was closed and he could not cast his vote. According to him some 300 to 350 people were standing inside the enclosure of voters, of whom 80 to 70 persons went away without casting their votes. Of course, in his report, Ext. 11(b), the Presiding Officer noted that the booth was closed at 5 P.M. and against Item No. 5 of the Report, which runs thus:— "Whether all electors, who attended, received ballot papers in time?" it was noted, "Yes". The Presiding Officer has not been examined. It is difficult to attach any value to his note in view of the evidence.

P.W. 9 Jogen Sarkar, Organiser of the Petitioner's election campaign, visited the Polling Station at about 9 A.M., again at about 10 to 10-30 A.M., another time at 1 P.M. and for the last time after 5 P.M. when the booth was closed. He noticed great crowd on every occasion and heard clamourings of the voters. Many voters were found by him complaining after 5 P.M. that they could not cast their votes.

P.W. 10 Abdul Mannan, Polling Agent of the Petitioner at Panchoor F.P. School questioned the Presiding Officer for opening only one booth and complained how could 1600 voters would poll their votes in one booth. His evidence is that a little less than 50 per cent. of the voters being 'purdah nashin' Muslim ladies, very few female voters could cast their votes, there being no separate arrangement for the female voters and that all the voters who assembled, specially the females amongst them could not vote when the polling was closed at 5 P.M. He noticed female voters to come in rickshaws and to go away disappointed. Many of the female voters of his family could not cast their votes, as he says on oath. Defective arrangement and great congestion are said to be responsible for inability of the voters, male and female, to cast their votes.

P.W. 11 Ali Azam says in cross-examination that 200 to 300 voters assembled and attended to cast their votes but on account of great rush many of them had to go away without casting their votes.

P.W. 12 Shafuiddin Ahmed who was in charge of the Congress election campaign at Panchoor, approached the Presiding Officer when one of the Petitioner's polling agents returned to the camp and reported that he had to come away as only one booth was opened and the Presiding Officer directed that one polling agent would be sufficient. His complaint to the Presiding Officer for not using two booths had no effect. According to him about 500 voters went away without being able to cast their votes, including his wife and other females. He also corroborates the alleged fact that 200 to 300 persons were present when the polling was closed.

P.W. 14 Haji Nurul Huo Mali, Vice-Chairman of the Garden Reach Municipality and a member of the Panchoor Union Board visited Panchoor F.P. School Centre between 10 to 11 A.M. hearing that there was good deal of confusion on account of rush of voters. He noticed 300 to 400 male voters assembled at the booth, who were clamouring for casting their votes and complaining of good deal of inconvenience. He waited for 45 minutes and noticed certain gentleman leaving the booth with ladies failing to exercise their right of franchise. His wife with 3 or 4 other females also returned without voting on account of rush.

P.W. 16 Mahabub Rahman who was an Honorary Magistrate in Calcutta Presidency Magistrate's Court, supervised the election on behalf of the Congress candidate. He visited Panchoor F.P. School Centre at about 3 P.M. when 200 to 300 voters were waiting to cast their votes. He also noticed a number of female voters to go away without being able to cast their votes. He heard the conversation among those females that they could not vote on account of congestion of males before the polling booth. His evidence is that Panchoor was a strong-hold of the Congress and 80 per cent. of the voters being Muslims, it was expected that all the Muslims would vote for the Congress candidate.

P.W. 18 Nagendra Nath Paul, Election Agent of the candidate Nagendra Nath Paul (Respondent No. 5) had been to Panchoor F.P. School Centre at 2 P.M. He noticed a row at the Polling Station.

From the evidence of P.W. 23 Provash Chandra Paul, Counting Agent of the Petitioner and the Congress worker for the election campaign, it has been obtained that Bagpota, Pathakbazar and Panchoor are three Congress strong-holds where 72 per cent. to 75 per cent. voters were expected to support the Congress and the expectation was fulfilled in other two centres, but on account of confusion at Panchoor, the expected number of votes could not be polled. To verify this statement it is found on calculation from Ext. Q, the abstract account of ballot papers, that the votes polled at Bagpota (Station No. 4), Panchoor (Station No. 23) and Pathakbazar (Station No. 25) were respectively 74.2 per cent., 41.75 per cent. and 68 per cent. Clearly the percentage at Panchoor was rather too low. The percentage of votes polled in the entire constituency as calculated by the learned defence Counsel is 57 per cent. The evidence adduced on the Petitioner's side amply justifies the allegation that many voters could not cast their votes at Panchoor F.P. School Centre.

The very nature of the non-compliance with the provisions of the law raises a presumption that the result of the election has been materially affected. The evidence adduced strengthens such presumption. The onus lies heavily on the Respondent No. 1 to rebut the presumption and to establish satisfactorily that the result of the election has not been materially affected. In 24 C.W.N. 189 (at p. 194) in connection with a Municipal election His Lordship Sir Ashutosh Mookerjee J observed, "As soon as the irregularity was established, the burden should have been thrown upon the defendants to establish that the result of the election has not, in fact, been affected".

On behalf of the Respondent No. 1 attempt has been made to discharge the onus examining 4 witnesses. R.W. 1 Jaharlal Pakrey, an illiterate voter, is examined to say that he could cast his vote at 3 P.M. when only 25 voters were standing in queue and there was no confusion or row. He remembers his voter No. as 1238 at this distance of time. His age is noted in the Electoral Roll, Ext. 4 as 38 years, but he now states the same as 28 years. R.W. 2 Selkh Mansur Ali, an organiser of the candidate Munsef Ali Molla did not notice any confusion in the booth while he went there. He did not wait to see if female voters cast their votes. He adds that in Panchoor area the Muslims are orthodox and their females are purdah nashin and that the Muslim female electors did not take part in the election. No such case has been made in the written statement regarding the female voters. Reference has already been made to the evidence of R.W. 3 Majibar Rahman, the Polling Agent of the Respondent No. 1 Sudhir Chandra Bhandari. He brings the Petitioner to the Polling Station to prove consent to the amalgamation of two booths. He saw notice hung-up outside the booth which was not seen by any other witness. R.W. 4 Abdul Hakim Molla corroborates Majibar Rahman. The learned defence Counsel Sri S. K. Acharya attempted to suggest in cross-examination of P.W. 25 Lakshmi Narain Ghose that on account of Congress propaganda to the effect that unless the electors voted for the Congress they would be put to trouble, many voters did not turn up to cast their votes. Such random suggestion to explain why the percentage of votes was so low, in the absence of any such case in the written statement, cannot be entertained. He further relies on the evidence of P.W. 19 Abu Bakkar Gazi who says that in the

morning hours 400 to 500 voters assembled within the enclosure and voters usually went away after casting their votes. The witness, however, noticed many voters going away when the polling was closed during recess. But though he was present at the booth from 8 A.M. as Polling Agent of the candidate Munsif Ali Molla, he was not aware of the admitted fact that there was amalgamation of 2 booths. His evidence is inconclusive and he appears to have taken very little interest in the work. No reliance can therefore be placed on his evidence. The evidence of rebuttal in the circumstances of the case appears too shaky and unworthy of credit.

The election was fought on party lines. In this connection the party affiliations of the candidates, their respective qualifications, the total number of votes polled by each of them and the votes secured by each at Panchoor F. P. School Centre, may throw a flood of light to determine the possibility of affecting the result of the election materially.

The Petitioner Sri Niharendu Dutt-Mazumder was a sitting Congress Judicial Minister to the State during the election. He stood with the Congress ticket. He is a Barrister. His election manifesto, Ext. 14, discloses his numerous political activities in India and abroad and his association with Netaji Subhas Chandra Bose. He was a member of the A.I.C.C. He led the labour movement and was twice elected member of the Legislative Assembly from Barrackpore Labour Constituency. He suffered imprisonment for his political work on several occasions, for a total period of 5 years. Certain Muslims of the Maheshtala Constituency convened a meeting to support his candidature as appears from the notice, Ext. 16. R.W. 2 Selkh Mansur Ali, whose name appears in it, wants now to dissociate himself with that meeting, which according to him was called only to decide whether the Muslims would support Sri Niharendu Dutt-Mazumder or Janab Munsef Ali Molla.

The Returned candidate Sri Sudhir Chandra Bhandari (Respondent No. 1) formerly belonged to the Congress. He joined the Communist party and contested the election with Communist ticket. He is business-man owning a furniture shop at Maheshtala. His election manifesto, Ext. 15, criticised the Congress Government bitterly and demanded that such government should be put to trial for its misdeeds by returning the Communist candidate to the Legislative Assembly.

Next contestant Sri Amiya Mandal, Respondent No. 2, was an Independent candidate. He is a pleader, but not a local man of Maheshtala area.

Respondent No. 3 Tejendra Kumar Basu was K.M.P.P. candidate. He is an employee of Bata Shoe Company. Formerly he was a Congress member.

Respondent No. 4 Sri Sudhir Mukhoti is a member of Democratic Vanguard Party, which is not a recognised party in election. Practically he became an independent candidate. He made no election campaign in Maheshtala, as P.W. 25 Lakshmi Narain Ghose states. He is the President of Bata Union.

Sri Nagendra Nath Paul, Respondent No. 5, is a pleader of Alipore Judge's Court and is a local man. He stood as an Independent candidate.

Lastly, the Respondent No. 6 Janab Munsef Ali is a local man and a pleader at Alipore. He fought the election as an Independent candidate. He had some influence in Maheshtala area.

Now, the total number of votes polled by these candidates were as follows:—

Petitioner	..	Sri Niharendu Dutt-Mazumder	..	6451
Respondent No. 1	...	Sri Sudhir Chandra Bhandari	...	6614
Respondent No. 2	..	Sri Amiya Mandal	..	3334
Respondent No. 3	..	Sri Tejendra Kumar Basu	...	830
Respondent No. 4	.	Sri Sudhir Mukhoti	.	1775
Respondent No. 5	.	Sri Nagendra Nath Paul	.	1097
Respondent No. 6	.	Janab Munsef Ali Molla	...	6078

The number of votes secured by these candidates at Panchoor F. P. School Centre is more relevant for the purpose of this case and they are as given below:—

Sri Niharendu Dutt-Mazumder	...	...	383
Sri Sudhir Chandra Bhandari	...	...	57
Sri Amiya Mandal	...	—	2
Sri Tejendra Kumar Basu	...	...	5
Sri Sudhir Mukhoti	...	...	NIL
and Janab Munsef Ali Molla	...	...	212.

At this Centre practically there was contest between Sri Niharendu Dutt-Mazumder and Janab Munsef Ali Molla. The difference of their votes is 171. Sri Dutt-Mazumder leading. Out of 1600 votes only 668 votes were polled, i.e., about 41.75 per cent. It has been satisfactorily established that on account of gross infringement of the Rules and consequent confusion, over-crowding, mismanagement and absence of any special arrangement for women voters, large number of electors could not exercise their right of franchise. This station being one of the strong-holds of the Congress, the Petitioner expected larger number of votes. The difference between his votes and those of the returned candidate Sudhir Chandra Bhandari is only 163. Sudhir Chandra Bhandari polled only 57 votes at that station while the Petitioner got 383 votes. If the voters got proper opportunity to cast their votes the result might reasonably have been different. It is, of course, no part of the duty of the Judge to enter into a kind of scrutiny to see whether possibly, or even probably, or as a matter of conclusion from the evidence, that the result of the election would have been different (*vide* observation of Mr. Baron Bramwell in the Durham Case reported in 2 O'M & H 152 at p. 157). In deciding whether the result of the election has been materially affected or not, every case is to be judged according to its special circumstances. In *Isligton Case* (*vide* 5 O'M & H 120 at p. 125), it was held that if the court sees that the effect of the transgression of law was such that the election was not really conducted in the manner prescribed under the existing election laws, or it is open to reasonable doubt whether the transgressions may not have affected the result of the election, and it is uncertain whether the candidate who has been returned has duly been elected by the majority of the persons who are entitled to vote in accordance with the law in force relating to elections, the court is then bound to declare the election void. The evidence adduced before this Tribunal in this case amply justifies the inference that the non-compliance with the provisions of the law has materially affected the result of the election. We, therefore, hold that the non-compliance with the provisions of law in conducting the election at Panchoor F. P. School Centre was of such a nature that there was practically no election in the manner prescribed by the law and the result of the election has been materially affected on that account. The question raised in point (b) is accordingly decided in favour of the Petitioner.

Issue No. 4.—The Tribunal has arrived at the decision that the election at Panchoor F. P. School, Polling Station No. 23 within Maheshtala Constituency was not held according to law and thereby the result of the election has been materially affected. The election of the returned candidate, Sri Sudhir Chandra Bhandari (Respondent No. 1) is accordingly liable to be declared void. The prayer for declaring the Petitioner, Sri Niharendu Dutt-Mazumder, who secured the next highest number of votes as duly elected, is untenable, the election being void on account of the non-compliance with the vital provisions of the law. The whole election must accordingly be declared void.

The objection in the Election Petition regarding the lodging of incomplete and inaccurate return of election expenses by the Respondent No. 1 Sudhir Chandra Bhandari, has not been pressed. The case has been prolonged pressing several unsubstantial objections on the Petitioner's side. The election is being set aside on account of transgressions of the provisions of the law by the Presiding Officer at Panchoor F. P. School Centre No. 23. The returned candidate Sri Sudhir Chandra Bhandari (Respondent No. 1) is in no way responsible and as such he cannot be held answerable for the costs of the Petitioner. No order will accordingly be made for costs.

ORDER.

The Election Petition No. 172 of 1952 be allowed and the election of the returned candidate Sri Sudhir Chandra Bhandari, Respondent No. 1, to the State Legislative Assembly of West Bengal from Maheshtala Constituency be declared void.

Each party will bear his own costs.

The 8th May, 1953

(Sd.) S. C. RAY CHAUDHURI, *Chairman,*
Election Tribunal.

The 8th May, 1953.

(Sd.) M. N. GAN, *Member,*
Election Tribunal.

(Sd.) SUDHIR KUMAR BHOSSE, *Member,*
Election Tribunal.

[No. 19/172/52-Elec. III/6876.]

By Order,

P. R. KRISHNAMURTHY, Asstt. Secy.